

CHAIR RORE
versus
THE MINISTER OF DEFENCE

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, 20, 21 and 28 May 2009 and 4 November 2009

Civil Trial

B Gorejena, for the plaintiff
K Gutu, for the defendant

CHITAKUNYE J: The plaintiff is a male adult resident at house number 2365 St Marys Chitungwiza. The defendant is the Minister of Defence cited in his official capacity.

On 14 November 2003 the plaintiff filed a suit against the defendant for damages in the sum of Z\$500 000-00. The plaintiff alleged that on 19 March 2003 he was asleep at his mother's house, house number 2365 St Marys Chitungwiza when he was awakened by a knock on his door. When he went outside in response to the knock, he was assaulted by members of the Zimbabwe National Army during the course and scope of their employment with the defendant. He therefore claimed damages in the sum of Z\$500 000-00 as a result of the injuries he sustained from the assault.

At trial the plaintiff amended his claim. He now claimed a total of US\$685-00 made up as follows:

1. US\$311-00 being damages for shock, pain and suffering.
2. US\$187-00 being damages for loss of amenities of life.
3. US\$187-00 being damages for *contumelia*.

The defendant denied that any member of the Zimbabwe National Army assaulted the plaintiff on the date in question. The defendant contended that the Zimbabwe National Army (herein referred to as "ZNA") members were only deployed in the plaintiff's area of residence on 20 March 2003 up to 26 March 2003.

The issues for determination were essentially two namely:

1. Whether the plaintiff was assaulted by members of ZNA; and
2. Whether the plaintiff is entitled to the quantum of damages as per summons as amended.

The plaintiff gave evidence after which he called his wife Rossy Domingo as his only witness. The defendant's case was testified to by Emmanuel Matatu. At the time of the incident in question he was the Brigadier General Operations based at the ZNA headquarters.

The plaintiff's evidence was to the effect that on 19 March 2003 he was asleep in the house when he was awakened by a knock on the door. Those knocking were also calling out his name. He got up and went outside. As he stood by the door he saw some soldiers. The soldiers were wearing an attire he described as their usual camouflage uniform. In further describing the attire he said it was green/grey/cream in colour with red baretts. He was able to see this because of lighting from electricity lights at the residence. He realized that these people were carrying guns he described as big guns, rifles.

When he went out of the house the soldiers asked him whether he was Chair and he confirmed so. The same question was asked to another man who was not in uniform. He later identified that man as his friend Danmore. After confirming that he was Chair one of the soldiers grabbed him and started assaulting him with a stick. They were also interrogating him in the process. When he got hold of the stick that was being used to assault him other soldiers joined in assaulting him. They were now assaulting him with clenched fists. At some stage he felt as if a sjambock was also used and an iron bar. After a while the soldiers took him and Danmore who apparently was also in their captive, to some houses in the neighbourhood. The soldiers pointed a gun at him and ordered him to go and point out neighbours he attended meetings with.

When they got to Brenda's father's house they were ordered to lie down and were assaulted further at this house. Brenda's father was not there but his wife. From that house they went to another house. From this other house the soldiers were pointing rifles at Danmore and himself. They went to Florence's house. At this house Danmore and himself were ordered to lie down facing down. The soldiers plucked tree branches from an Avocado tree and started assaulting them with the branches. The assaults were concentrated at the back. They then went to Daniel's house which is near his mother's house where he had been sleeping. Daniel was called and assaulted. At Daniel's house all the people that were found there were assaulted.

After that the plaintiff, Danmore and Florence were severely assaulted further. Towards dawn they were ordered to stand up. It was then that he saw some motor vehicles by the gate. These were army motor vehicles as they were painted in the same colour as the uniforms of the soldiers. The motor vehicles were four in number and they looked like PUMAS. He also realized that the number of soldiers had increased.

It was also his evidence that they were later ordered to board the ZNA trucks he described as similar to PUMAS. In the truck he observed benches on the sides and they sat in between the benches in the centre of the loading tray.

They were then driven and ordered off at some place along the Mbare-Chitungwiza road. Upon disembarking they ran away in different directions. When he returned to his residence his wife applied hot compression on him. Later but on that same day 20 March 2003 he left for Shurungwi to reside with his brother.

After about three weeks he returned to St Marys. He thereafter proceeded to Harvest House in Harare where MDC top officials gave him a letter to take with him to a doctor. He confirmed that he received medication and Dr Coric examined him and compiled a medical affidavit.

The plaintiff's wife Rossy Dimingo gave evidence in support of the plaintiff's case. Her evidence on the identity of the assailants was to the effect that they were ZNA members. According to her evidence after knocking on the door the soldiers entered their bedroom and she saw that they were soldiers as they were clad in ZNA camouflage uniform. When they entered, she saw that they were armed with sjamboeks which they wanted to assault plaintiff with.

She indicated that the soldiers then went out and started assaulting the plaintiff. The soldiers were clad in camouflage green/grey and brownish in colour uniform. They also were putting on red barets and black boots. After assaulting the plaintiff, the plaintiff and Danmore were taken away by the soldiers. At that time there were six soldiers.

It is pertinent to point out that the plaintiff's case had its own problems. Whilst in his evidence in court the plaintiff and his wife referred to the guns the assailants had as rifles without any hesitation, in his summary of evidence, the plaintiff referred to the guns as service pistols. In para 3 of the summary of evidence the plaintiff had this to say:

“Some uniformed members of the ZNA wielding service pistols forced entry into the plaintiff's bedroom”.

Nowhere in either the declaration or the summary of evidence did the plaintiff refer to rifles as having been used or even sighted on the night in question.

According to his declaration and summary of evidence the assaults were perpetrated using baton sticks, fern belt and boots yet in their evidence in court both the plaintiff and his wife opted to include other weapons like sjamboek and rifles. The plaintiff went on to include avocado tree branches and an iron bar.

In para 5 of the summary of evidence the plaintiff indicated that after being assaulted with baton sticks, fenn belt and boots all over the body, he was then dragged to Chitungwiza cemetery and was dumped there.

The evidence adduced did not support such an assertion at all. The aspect of dragging was within the premises of the house he was found at and it was as he was being assaulted. He was not dragged to the cemetery at all. He was taken to the Mbare-Chitungwiza road in a motor vehicle.

In para 6 of the same summary of evidence the plaintiff stated that:

“as a result of the assault, the plaintiff suffered excruciating pain. He also sustained multiple bruises, cuts and a broken right arm. He had to be detained in hospital for some time”

Surprisingly in his evidence in court the plaintiff and his witness never alluded to being detained in hospital at all. The sequence of events the two seemed agreed on was that on 20 March 2003 the plaintiff left for Shurugwi. In Shurungwi he never attended any medical institution or sought medical attention from anyone. According to the plaintiff he spent about three weeks in Shurugwi. He then returned to St Marys. He later went to his party's Head Office at Harvest House in Harare where he saw some top officials. The top officials gave him a letter which he took to a doctor. It was then that he received some medical attention. He was thereafter referred to Dr Milos Coric an Orthopaedic Surgeon. As a result of that visit, Dr Coric compiled a medical affidavit. According to that affidavit the examination was conducted on 14 April 2003 a period of at least twenty five days from the date of the assault.

The plaintiff's wife seemed to confirm that the plaintiff did not seek immediate medical attention. The medical affidavit did not show the multiple bruises and cuts referred to in the summary of evidence. The affidavit simply confirms a fracture of the right ulna

(forearm). The assertion that the plaintiff was detained in hospital is not supported by any evidence adduced in court.

As already alluded to, the medical affidavit by Dr Coric pertained to the examination done on 14 April 2003. It did not show that the plaintiff was ever detained in hospital.

Another point of concern on the medical affidavit is on the history. In the copy of the medical affidavit dated 7 March 2007, which the plaintiff seemed to prefer, exh 1 under history it is stated that "Zimbabwe National Army officers attacked this man on 19 March 2003".

In the second copy of the same affidavit dated 10 August 2004, exh 2 the same doctor endorsed the history as being that "this man was attacked by political opponents on 19 March 2003". The change in the identity of attackers from political opponents as in the affidavit of 19 August 2004 to ZNA officers as on the affidavit dated 7 March 2007, needed the deponent thereto to clarify. Unfortunately this was not done.

This is an irregularity that put into question the credibility of the affidavit in question. The plaintiff himself could not adequately explain that anomaly.

Whilst the plaintiff's counsel sought to down play the anomaly, I am of the view that in as far as the history of a patient is concerned it is expected to be from the patient or someone with such knowledge, such an anomaly casts a shadow of doubt on the plaintiff's credibility as well.

If on 14 April 2003 he indicated his assailants as political opponents why have that changed to ZNA officers in March 2007. In any case no reason was advanced for seeking a second medical affidavit. If the assailants were ZNA officers, and the plaintiff knew that as of fact, that should have been reflected from the onset. In as far as the only difference between the first medical affidavit and the second medical affidavit is on the history and date, one is tempted to believe that the second medical affidavit was obtained to tie up the medical affidavit to the plaintiff's claim.

It must be remembered that as was held in *Matiza v Pswarayi* 1999 (1) ZLR 140 (S) at p 140 where there are mutually destructive stories the court must be satisfied that the version given by the party on whom the onus rests is true and the other false. Unless this can be found, the plaintiff cannot be said to have discharged the onus on him.

For a party's version to be found to be true, there should be some consistency in his version. Discrepancies maybe overlooked where such discrepancies do not seriously affect the

party's credibility in version of events. Where, as in this case, the plaintiff's version as contained in papers filed of record is inconsistent with the plaintiff's evidence in court on material aspects relevant to the issue at hand it is difficult to find that the plaintiff has discharged the onus.

In *Matiza v Pswarayi (supra)* the court was faced with a similar situation whereby the plaintiff on whom rested the onus of proof, gave three versions. The first version in the declaration, another version in a letter tendered, and a third version in his evidence in court. The trial court made a finding that he had not discharged the onus on him.

On appeal the Supreme Court at p 143 also concluded that:

“It cannot be said that the appellant's version is true and that the respondent's version is false. The appellant did not therefore, prove his claim on a balance of probabilities”.

See also *S v Nicolle* 1991 (1) ZLR 211 at p 214.

In *casu* the factors that the plaintiff alluded to in identifying the assailants were quite common. He indeed referred to the attire as “the usual uniform”. Clearly this would not have been his first time to see such a uniform with such colors. This camouflage uniform for ZNA is common. Being able to describe the camouflage uniform that is commonly worn by ZNA members cannot on its own be an indication that he indeed saw the soldiers on the night in question. This has to be taken together with other factors. Even his wife's description was a common description of the usual uniform.

The two did refer to the soldiers putting on red barets as well. As Emmanuel Matatu indicated, these are worn by members of the military police. He also indicated that members of the military police are not deployed on such operational duties.

It was thus pertinent to rebut that. The discrepancies in the plaintiff's evidence do point to someone intent on either embellishing his evidence or simply not being candid with court at all. The medical affidavit confirms the desire to shift blame for what may have befallen the plaintiff on the night of 19 March 2003 from his political opponents to being members of the Zimbabwe National Army. In the light of all these discrepancies I am not satisfied that the plaintiff has proved on a balance of probabilities that his assailants were members of the Zimbabwe National Army.

Accordingly the plaintiff's claim is hereby dismissed with costs.

Zimbabwe Human Rights NGO Forum, plaintiff's legal practitioners
Attorney General's Office, defendant's legal practitioners